

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3
4
5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

8
9 ROSHON THOMAS,

10 Defendant.

No. CR-03-129-FVS

ORDER DENYING MOTION TO
VACATE

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12 **THIS MATTER** comes before the Court without oral argument based
13 upon the defendant's motion to vacate. For the reasons explained
14 below, the Court lacks authority to consider the motion.

15 **BACKGROUND**

16 The following is a partial chronology of the procedural history
17 of the defendant's case. The defendant entered a conditional plea of
18 guilty to the crime of possession with intent to distribute a
19 controlled substance. 21 U.S.C. § 841(a)(1). Judgment was entered on
20 December 8, 2004. The defendant was committed to the custody of the
21 Bureau of Prisons for a period of 188 months. He is presently serving
22 the sentence.

23 The defendant appealed his conviction. On July 10, 2006, the
24 District Court Executive of the Eastern District of Washington
25 received the mandate of the Ninth Circuit affirming the defendant's
26 conviction. On April 25, 2007, the defendant filed a motion to vacate

1 his conviction and sentence. 28 U.S.C. § 2255. The Court denied his
2 motion on August 9th. On August 27th, the District Court Executive
3 docketed his notice of appeal. The Court denied a certificate of
4 appealability ("COA") on September 10th. On September 28th, the
5 District Court Executive received a form from the Clerk of the Ninth
6 Circuit acknowledging the defendant's notice of appeal and informing
7 the District Court Executive of the case number that had been assigned
8 by the Ninth Circuit. Thereafter, the District Court Executive
9 submitted a number of documents to the Ninth Circuit. On January 28,
10 2008, the Ninth Circuit also denied a COA. 28 U.S.C. § 2253(c)(2).
11 The Ninth Circuit did not issue an order addressing the merits of the
12 defendant's appeal of this Court's order denying his motion to vacate.

13 On September 16, 2008, the defendant filed a motion attacking the
14 judgment under Federal Rule of Civil Procedure 60(b). On October 6th,
15 the Court denied his motion because it was, in essence, a second §
16 2255 motion and he had not obtained permission from the Ninth Circuit
17 to file it. On October 8th, he filed a supplemental Rule 60(b)
18 motion. The Court denied his supplemental motion on October 9th. He
19 appealed. The Ninth Circuit remanded the matter so the Court could
20 decide whether to issue a COA. On February 4, 2009, the Court
21 declined to do so. On November 22, 2010, the Ninth Circuit affirmed
22 the Court's characterization of the defendant's Rule 60(b) motions as
23 second or successive § 2255 motions. In addition, the Ninth Circuit
24 ruled he had failed to make the showing that is required by § 2255(h)
25 in order to obtain permission to file a second or successive § 2255
26 motion.

1 During October of 2011, the defendant filed two motions. The
2 first motion alleged the District Court Executive failed to forward to
3 the Ninth Circuit the notice of appeal the District Court Executive
4 received on August 27, 2007 in response to the Court's decision to
5 deny the defendant's first § 2255 motion. The Court denied the first
6 motion because the District Court Executive had, in fact, forwarded
7 all of the relevant documents to the Ninth Circuit during September of
8 2007. The second motion the defendant filed during October of 2011
9 alleged this Court had not resolved all of the issues he raised during
10 2007. The Court denied the second motion because it had, in fact,
11 resolved all material issues the defendant presented to the Court
12 during 2007. The defendant filed a notice of appeal. The Ninth
13 Circuit declined to issue a COA on April 13, 2012.

14 On May 30th, the defendant resubmitted a motion to vacate. 28
15 U.S.C. § 2255. He remains convinced the Ninth Circuit has never
16 considered, much less adjudicated, the issues he raised in his 2007
17 motion. He is unsure why the Ninth Circuit failed to act. He
18 suspects the Ninth Circuit's alleged inaction may be the result of
19 this Court's failure to properly process his 2007 notice of appeal.
20 The threshold issue is whether the Court has authority to consider the
21 defendant's resubmitted § 2255 motion.

22 **RULING**

23 The record shows the Clerk of the Ninth Circuit Court of Appeals
24 timely received the defendant's 2007 notice of appeal from the
25 District Court Executive of the Eastern District of Washington. The
26 defendant's suspicions regarding the District Court Executive's

1 handling of the 2007 notice of appeal are unfounded. There is no
2 reason this Court should revisit his 2007 motion to vacate. Indeed,
3 the Court lacks authority to do so. As the defendant seems to
4 acknowledge, the pending § 2255 motion is a second or successive §
5 2255 motion. Accordingly, this Court lacks jurisdiction to consider
6 it unless and until the defendant obtains a certificate from the Ninth
7 Circuit authorizing this Court to do so. See *United States v.*
8 *Washington*, 653 F.3d 1057, 1065 (9th Cir.2011).

9 **IT IS HEREBY ORDERED:**

10 The defendant's motion to vacate (**ECF No. 179**) is **denied** for lack
11 of jurisdiction.

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this order and furnish copies to the defendant and
14 to counsel for the United States.

15 **DATED** this 19th day of June, 2012.

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17 s/ Fred Van Sickle

Fred Van Sickle
18 Senior United States District Judge
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